Supreme Court, U.S.
FILED
MAR 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1390

In the Supreme Court of the United States

OCTOBER TERM, 1986

OHIO CITIZENS FOR RESPONSIBLE ENERGY, INC., PETITIONER

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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25 pp

QUESTION PRESENTED

Whether a Nuclear Regulatory Commission order refusing to allow a party to reopen the administrative record to introduce new evidence in a pending licensing proceeding is a "final order" reviewable in the court of appeals under 28 U.S.C. 2342(4) and 42 U.S.C. 2239(b).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A4-A9) is reported at 803 F.2d 258. An earlier order of the court of appeals (Pet. App. A1-A3) is unreported. The memorandum and order of the Nuclear Regulatory Commission (Pet. App. B1-B17) is reported at 23 N.R.C. 233. The memorandums and orders of the Atomic Safety Licensing and Appeal Board are unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1986. A petition for rehearing was denied on November 25, 1986 (Pet. App. A11-A12). The petition for a writ of certiorari was filed on February 21, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The memorandums and orders of the Atomic Safety Licensing and Appeal Board are not reprinted in the appendix to the petition. We have lodged copies with the Clerk of the Court.

STATEMENT

1. a. In 1980, respondent Cleveland Electric Illuminating Company (CEI) and other public utilities applied to the Nuclear Regulatory Commission (NRC or Commission) for a license to operate the Perry Nuclear Power Plant, a two-unit facility located on the shore of Lake Erie in northeastern Ohio.[2] The following year, the NRC began hearings on whether to issue an operating license for the plant, and petitioner was permitted to intervene in the proceedings as a party. The hearings were conducted by the Atomic Safety and Licensing Board (Licensing Board), which issued partial initial decisions in favor of plant operation on December 2, 1983 (18 N.R.C. 1365), and on September 3, 1985 (22 N.R.C. 514). Petitioner appealed the Licensing Board's decision to the Atomic Safety and Licensing Appeal Board (Appeal Board).

On January 31, 1986, while petitioner's appeal was pending before the Appeal Board, an earthquake of magnitude 5.0 occurred approximately ten miles south of the Perry plant.[3] Three days later, petitioner filed with the Appeal Board a motion to reopen the administrative record, seeking leave to raise a new claim challenging the adequacy of the plant's seismic design (Pet. App. B2). Attached to the motion was a newspaper article about the earthquake (*id.* at A5), but the motion was devoid of any technical basis for believing the plant's design to be inadequate. The Commission staff and the applicants opposed the motion to reopen the record. In its reply pleading filed

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[2] The applicants for the license were CEI, Duquesne Light Company, Ohio Edison Company, Pennsylvania Power Company, and the Toledo Edison Company. These applicants were intervenors in the court of appeals and are respondents in this Court.

[3] The plant was constructed to shut down safely in the event of an earthquake of magnitude 5.3 (App., *infra*, 3a).

with the Appeal Board, petitioner conceded that, to the extent that the earthquake caused high frequency vibrations exceeding those expected from a "Safe Shutdown Earthquake," those "high frequency exceedances * * * do not have engineering significance" (*id.* at B6). Petitioner further conceded that the earthquake had caused little or no damage to the Perry plant (*ibid.*). The Appeal Board concluded that it was unable to decide whether the motion to reopen should be granted, and, by an unpublished order dated March 20, 1986, the Appeal Board scheduled an exploratory hearing to consider the matter further (*id.* at B2-B3).

b. On April 18, 1986, the Commission, acting sua sponte, vacated the Appeal Board's March 20 order and denied petitioner's motion to reopen the administrative record, on the ground that the Appeal Board's decision was contrary to established NRC precedent (Pet. App. B1, B8). The Commission ruled that the Appeal Board should have denied petitioner's motion, rather than schedule a hearing, if the Board found itself unable to conclude, on the basis of the papers before it, that petitioner had raised a safety question of sufficient significance to warrant reopening the record (*id.* at B4-B5).[4] The Commission instructed its staff, however, to be prepared to discuss the matters raised in the Appeal Board's March 20 order as part of the staff's upcoming presentation to the Commission on the question whether to issue a full-power operating license for the Perry facility (*id.* at B8).

2. On April 23, petitioner filed a petition for review of the Commission's April 18 order in the court of appeals. On September 4, 1986, one day before the Commission

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[4] Commissioner Asselstine, the sole dissenter, believed that the Appeal Board correctly decided to hold a brief exploratory hearing before ruling on the motion (Pet. App. B10-B17). He did not express any opinion, however, whether the record should have been reopened.

was scheduled to discuss and possibly to vote on the question whether to issue a full-power operating license for the Perry plant, the court of appeals, at petitioner's request and by a divided vote, issued a stay barring the Commission from taking "any possible vote" on the Perry license (Pet. App. A2).[5] On October 14, the court, over one dissent, dissolved the stay and dismissed the petition for review, on the ground that the Commission's order denying petitioner's motion to reopen the record was not a "final order" reviewable in the court of appeals under 28 U.S.C. 2342(4) and 42 U.S.C. 2239 (Pet. App. A7-A8).[6] The court concluded that judicial review should be postponed until the Commission granted or denied the license application, since all challenges raised during the course of an NRC proceeding can be resolved at that time (*id.* at A8).[7]

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[5] Judge Nelson dissented on the ground that the court lacked authority to stay a Commission vote on a full-power operating license application (Pet. App. A2-A3).

[6] Judge Jones dissented on the ground that the Commission's order refusing to reopen the record was an appealable collateral order (Pet. App. A10).

[7] On October 23, petitioner sought rehearing en banc in the court of appeals, and on October 27 petitioner again sought a stay from that court, asserting that the Commission could not issue an operating license for the Perry plant, because the court of appeals had not yet issued the mandate from its October 14 decision. The court of appeals denied the stay request on November 7 and denied rehearing on November 25. On January 5, 1987, petitioner applied to Justice Scalia for a stay of the mandate of the court of appeals pending the filing of a petition for a writ of certiorari. Justice Scalia denied the application on January 8. *Ohio Citizens for Responsible Energy* v. *NRC*, No. A-499.

Other proceedings have been ongoing in the meantime. On September 5, 1986, the State of Ohio sought leave from the Commission to intervene as a party to the Perry licensing proceedings. The Commission denied the state's request on October 30, and Ohio filed a petition for review of the Commission's decision in the court of ap-

ARGUMENT

The decision of the court of appeals is correct, it does not conflict with any decision of this Court or of any other court of appeals, and it presents no significant legal question. Accordingly, review by this Court is not warranted.

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peals (*Ohio ex rel. Celebrezze* v. *NRC*, No. 86-4019). On November 7, at the state's request, the court of appeals issued a stay barring the Commission from issuing a full-power license for the Perry plant. The court of appeals lifted the stay on November 11 and authorized the Commission to issue a license for the Perry plant. The license was issued two days later, November 13. On the same day, the court of appeals in the *Ohio* proceeding issued a new stay barring the licensee from using the license for full-power operation. The court of appeals eventually set the stay aside on December 23. Petitioner applied to Justice Scalia for a stay of the court of appeals' December 23 order, and the application was denied on December 31. *Ohio Citizens for Responsible Energy, Inc.* v. *NRC*, No. A-480.

In the interim, Ohio commenced another proceeding in the court of appeals seeking review of the Commission's decision to issue an operating license for the Perry plant (*Ohio ex rel. Celebrezze* v. *NRC*, No. 86-4038). The petitioner in this case did the same (*Ohio Citizens For Responsible Energy, Inc.* v. *NRC*, No. 86-4037). The court of appeals consolidated all three petitions (*i.e.*, Ohio's petition seeking review of the Commission's order denying it party status (No. 86-4019), and the petitions filed by the petitioner in this case and Ohio seeking review of the Commission's decision to grant a full-power operating license for the Perry plant (Nos. 86-4037 and 86-4038)), and heard argument on December 3, 1986. On December 23, the court of appeals, in the same consolidated proceeding, lifted the stay barring full-power operation at the Perry plant.

Finally, on March 17, 1987, the court rendered a decision on the three consolidated petitions. The court upheld the Commission's refusal to permit Ohio to intervene in the Perry licensing proceeding, as well as the Commission's decision to issue a full-power operating license for the Perry plant. For the convenience of the Court, the court of appeals' March 17 decision is reprinted in an appendix to this brief. App., *infra*, 1a-14a. The correctness of that decision, however, is not before the Court in this case.

The Hobbs Act provides the courts of appeals with exclusive jurisdiction to review "all final orders of the [Nuclear Regulatory Commission] made reviewable by" Section 189 of the Atomic Energy Act of 1954, 42 U.S.C. 2239 (28 U.S.C. 2342(4)), and the latter statute authorizes judicial review of a "final order" entered by the Commission in a proceeding "for the granting * * * of any license" (42 U.S.C. 2239(b)). It is well settled that the "final order" in a licensing proceeding is an order granting or denying a license. *NRDC* v. *NRC*, 680 F.2d 810, 815 (D.C. Cir. 1982); *Citizens for a Safe Environment* v. *AEC*, 489 F.2d 1018, 1021 (3d Cir. 1974); *Thermal Ecology Must Be Preserved* v. *AEC*, 433 F.2d 524, 525 (D.C. Cir. 1970); see *Ecology Action* v. *AEC*, 492 F.2d 998, 1001 (2d Cir. 1974); cf. *Stringfellow* v. *Concerned Neighbors in Action*, No. 85-184 (Mar. 9, 1987), slip op. 4 (quoting *Catlin* v. *United States*, 324 U.S. 229, 233 (1945)) (a final judgment under 28 U.S.C. 1291 "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment"). The Commission's April 18, 1986, order in this case, which simply denied petitioner's motion to reopen the administrative record in a pending licensing proceeding, is plainly not a "final order" under the above decisions.

Nor does that order constitute an immediately appealable collateral order. To qualify as a collateral order, a decision must conclusively determine a disputed question, it must resolve an important question completely separate from the merits of the case, and it must be effectively unreviewable on appeal from a final judgment. *E.g.*, *Stringfellow*, slip op. 4; *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978). Because petitioner can raise its claim on appeal from the order entered by the Commission issuing a license, the Commission's April 18 order does not satisfy the third requirement noted above and is not immediately reviewable in the court of appeals. *Stringfellow*,

slip op. 5-6 (district court order placing restrictions on an intervenor's participation in the case is not an appealable collateral order); see *Ecology Action*, 492 F.2d at 1001 ("an order excluding evidence would normally be the archetype of a non-final order, since any error would be inconsequential if the proponent prevails and can be corrected on review of the final order if he loses"); *Thermal Ecology*, 433 F.2d at 525-526 (NRC order denying an intervenor the opportunity to introduce certain evidence at a licensing hearing is not final).[8]

Petitioner's underlying argument is that its safety claims are significant and that the NRC improperly refused to consider them in the Perry licensing proceeding. But that issue was not before the court of appeals in this case. The court of appeals addressed that subject in its March 17, 1987, decision, in which the court upheld the Commission's refusal to reopen the administrative record to consider petitioner's claims.[9] Petitioner cannot obtain review of that decision in this case, however, and its challenge to the correctness of the NRC's April 18, 1986, order is not properly before the Court at this time.

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[8] Petitioner errs in asserting (Pet. 16-17) that the decision below conflicts with *Westinghouse Elec. Corp.* v. *NRC*, 598 F.2d 759 (3d Cir. 1979). In that case, the Commission issued an order suspending its work on a generic environmental impact statement regarding the reprocessing of spent nuclear fuel, as well as its consideration of pending applications to construct reprocessing plants. Six months later, the Commission issued a statement giving its reasons for the first order. The court of appeals expressly declined to decide which order was "final" under 28 U.S.C. 2342(4) and 42 U.S.C. 2239(b), since every party had filed a timely petition for review from each order. 598 F.2d at 766, 768.

[9] In that decision, the court of appeals observed that the only evidence petitioner offered to support its concern with seismic activity was a newspaper article (App., *infra*, 6a). The court of appeals continued (*id.* at 6a-7a):

> Even if the NRC had permitted [the Appeal Board] to proceed with its exploratory hearing, [petitioner] planned to offer no in-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1987

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formation or analysis of its own, but intended instead to conduct a cross-examination of witnesses presented by [the license applicant] and the NRC staff. Furthermore, [petitioner] had conceded that the January [1986] earthquake did little or no damage to the plant and that "the high frequency exceedances of the SSE [Safe Shutdown Earthquake] design acceleration recorded in the January 31, 1986 earthquake do not have engineering significance." Instead, [petitioner] sought to introduce a new theory based on the improbable contention that a discoverable "capable fault" (as defined in 10 C.F.R. Part 1, App. A, III(g)) caused the earthquake, even though such faults have rarely been identified east of the Rocky Mountains, and that the NRC staff had accordingly applied the wrong standards in making its seismic calculations.

The court of appeals concluded that petitioner's submissions comprised merely "the barest of allegations that the * * * earthquake has undermined the technical premises of the plant's structural design," and that these allegations were "palpably lacking in proof" (*id.* at 7a).

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 86-4019, 86-4038 & 86-4037

STATE OF OHIO (86-4019 & 86-4038) AND OHIO CITIZENS FOR RESPONSIBLE ENERGY, INC. (86-4037), PETITIONERS

v.

NUCLEAR REGULATORY COMMISSION, AND UNITED STATES OF AMERICA, RESPONDENTS

CLEVELAND ELECTRIC ILLUMINATING COMPANY, DUQUESNE LIGHT COMPANY, OHIO EDISON COMPANY, PENNSYLVANIA POWER COMPANY, AND TOLEDO EDISON COMPANY, INTERVENORS

Decided and Filed March 17, 1987

Petition to Review Orders of the Nuclear Regulatory Commission

Before: ENGEL, JONES, and RYAN, Circuit Judges.

RYAN, Circuit Judge, delivered the opinion of the court, in which ENGEL, Circuit Judge, joined. JONES, Circuit Judge, (pp. 13-14) delivered a separate concurring opinion.

RYAN, Circuit Judge. Petitioners seek to overturn three orders of the Nuclear Regulatory Commission (the NRC):

1. Petitioner State of Ohio appeals an order of the NRC denying leave to intervene in licensing proceedings pertaining to the Perry Nuclear Power Plant (the plant);

2. Petitioner Ohio Citizens for Responsible Energy, Inc. (OCRE) appeals an order of the NRC denying its motion to reopen the record in the plant licensing proceedings; and

3. Both petitioners appeal the NRC's order authorizing the plant's full-power operating license.

The issue is whether the NRC reasonably exercised its discretion in making these determinations. We hold that it did, and affirm all three orders.

I.

In 1980, intervenor Cleveland Electric Illuminating Company (CEI) and other public utilities applied to the NRC for a license to operate the Perry Nuclear Power Plant on the shore of Lake Erie in Northern Ohio. The NRC granted party status to OCRE and other interested parties in 1981. The State of Ohio did not seek to participate at that time.

Hearings were held pursuant to the Atomic Energy Act, 42 U.S.C. § 2239(a) (1973), in 1983 and 1985. No party to the proceedings raised the issue of the plant's capacity to withstand earthquakes. The adequacy of emergency planning was challenged by Sunflower Alliance, an intervenor in the proceedings, and was ultimately approved by the NRC. The record was closed on May 3, 1985.

On January 31, 1986, an earthquake of magnitude 5.0 on the Richter scale occurred approximately ten miles away from the plant. On February 3, 1986, OCRE filed a motion to reopen the record to consider the capacity of the plant's structures to resist seismic activity of this magnitude. In support of its motion. OCRE submitted a newspaper article reporting that vibratory ground motion at the plant during the earthquake had exceeded the peak acceleration for which the plant had been designed.

The NRC staff studied the available data and determined that, while the earthquake was severe and was different in some respects from the archetype of earthquake motion used in designing the plant structures, the high frequency energy levels that had exceeded the "design spectrum" for ground motion did not raise a serious safety concern. The plant had been designed to withstand earthquakes with magnitudes of 5.3 ± 0.5 because the most severe earthquake in the pertinent geographical zone, the 1937 Anna, Ohio, earthquake had an estimated magnitude of 5.0-5.3.

The appeal panel to which OCRE's contentions were submitted, recognizing the highly technical nature of the issue, scheduled an exploratory hearing in order to fully consider OCRE's claims. The NRC, however, determined that such a hearing was not appropriate and, because OCRE had failed to support its motion with evidence sufficient to merit reopening the record, ordered that the motion be denied. OCRE has appealed this denial.

The January, 1986, earthquake also stimulated new concerns on the part of the Governor of Ohio. These concerns were heightened by the April, 1986, nuclear accident at Chernobyl, in the Soviet Union, and eventually focused upon the adequacy of the emergency preparedness plans for Ohio's commercial nuclear reactors. On August 15, 1986, the Governor appointed a cabinet-level task force to review the adequacy of the evacuation plan which had previously been prepared by Ohio authorities with a view to the eventual full-power operation of the plant. On the same day, the Governor informed the NRC that he was withdrawing his support for the plan. He requested that the NRC delay its vote on full-power licensing until after the task force report was complete. The task force was given a due date of December 31, 1986. We have not been advised at this writing whether the report has been completed or, if completed, released.

While maintaining informal communications with the NRC about its concerns and the progress of the task force's investigation. Ohio also sought formal intervention in the proceedings on September 5, 1986, as an "interested state" under 10 C.F.R. § 2.715 (1986). On October 29, Ohio submitted preliminary findings of the task force to the NRC, requesting that full-power licensing be delayed until the report was completed and the emergency plan could be revised accordingly. On October 30, the NRC denied Ohio's motion to intervene. Ohio has appealed this denial.

Meanwhile, the NRC's final vote on the plant's full-power license, originally scheduled for September 4, was stayed by this court at the instance of OCRE, which contended that it had a right to appeal the denial of its motion to reopen the record prior to that vote. On October 14, this court rejected OCRE's petition for review on the ground that the denial was not a final agency order. *Ohio Citizens for Responsible Engergy, Inc. v. NRC,* No. 86-3355, slip op. (6th Cir. Oct. 14, 1986). Accordingly, the stay was lifted.

On November 7, as the NRC prepared to conduct the vote on full-power licensing, Ohio petitioned this court to review the NRC's denial of Ohio's motion to intervene and also sought an emergency stay of the vote pending review. The vote proceeded, and the license was granted. Ohio and OCRE both sought review in this court of the NRC's final order granting the full-power operating license.

Although the license was issued on November 13, 1986, this court immediately ordered that implementation of full-power operation be stayed pending our review of these appeals. The plant thus continued operating at 5% capacity, as it had before the license was issued, rather than beginning the gradual escalation to 100% capacity authorized by the license.

On November 14, we consolidated and expedited the appeals of Ohio and OCRE. Oral argument was heard on December 3. On December 12, 1986, the five intervenor utilities moved the court to lift the stay, claiming that the "costs of delaying plant operations are accumulating at approximately $2.2 million per day or more than $40 million to date." The motion was opposed by the State of Ohio. We lifted the stay on December 23, 1986, Judge Jones dissenting. An application to the United States Supreme Court by OCRE to stay the mandate of our order lifting the stay was denied on December 31, 1986, in an opinion of Justice Scalia.

II

OCRE contends that the NRC's refusal to reopen the record in response to its request following the January, 1986, earthquake illustrates two chronic bureaucratic evils: first, the agency's inclination to shut the public out of the decision-making process, confident in the sufficiency of its own knowledge and expertise; and second, the agency's impatience with the pace of the democratic decision-making process imposed upon it by statute, which inclines the NRC to dispense with any procedure, however well-founded, that threatens delay.

In this case, these contentions are without merit. The agency proceedings in this case do not suggest an intolerance for public participation on the part of the NRC. The statutory scheme requires hearings to be held only upon those issues interested parties raise before the NRC in a timely manner. In the absence of a request, no hearings need be held at all. 42 U.S.C. § 2239(a)(1). Safety concerns not raised in public hearings must nonetheless be addressed by the NRC staff.

In this case, seismic considerations were not raised by OCRE or any other participant in the public licensing hearings. Accordingly, the NRC staff addressed this issue

on its own in accordance with the NRC's Seismic and Geologic Siting Criteria for Nuclear Power Plants, 10 C.F.R. Part 1, App. A. Thus, the NRC's reluctance to reopen the record on this issue does not imply either a high-handed disdain for public comment or a lack of concern for the seriousness of the issue. Rather, it indicates only that the public comment period was closed, and that the NRC had not been convinced that OCRE had a significant contribution to make to further staff analysis.

True, new data, in the form of an unexpected earthquake, had appeared since the closing of the record. However, in the absence of some showing that OCRE could assist materially in the analysis of that new data, there is no reason why that event, of itself, would require the record to be reopened. One of the purposes of the NRC's discretionary option to refuse reopening the record is to assure that the party who would reopen the record offers such material assistance rather than a mere continuation or rehash of the process ostensibly terminated when the record was closed initially.

"Under Commission practice, reopening is required when *new evidence* is shown to be *timely, safety significant,* and sufficiently *material* to have changed the result initially taken." *San Luis Obispo Mothers for Peace v. NRC,* 751 F.2d 1287, 1318 (D.C. Cir. 1984) (emphasis in original), *aff'd,* 789 F.2d 26 (D.C. Cir. 1986) (en banc). Here, OCRE's motion was conceded to be timely, but the NRC held the OCRE had not shown safety significance.

At the time of its motion, OCRE submitted only a newspaper article in support of its claims. Even if the NRC had permitted the appeal panel to proceed with its exploratory hearing, OCRE planned to offer no information or analysis of its own, but intended instead to conduct a cross-examination of witnesses presented by CEI and the NRC staff. Furthermore, OCRE had conceded that the January earthquake did little or no damage to the plant

and "that the high frequency exceedances of the SSE [Safe Shutdown Earthquake] design acceleration recorded in the January 31, 1986 earthquake do not have engineering significance." Instead, OCRE sought to introduce a new theory, based on the improbable contention that a discoverable "capable fault" (as defined in 10 C.F.R. Part 1, App. A, III(g)) caused the earthquake, even though such faults have rarely been identified east of the Rocky Mountains, and that the NRC staff had accordingly applied the wrong standards in making its seismic calculations.

In the face of this claim, palpably lacking in proof, the NRC staff opposed an extensive study purporting to answer OCRE's contentions in an exhaustive and technical manner.

Although we recognize the possibility that the pace of events and the implications of new information and developments may at times outstrip the relatively fixed agenda of an entrenched bureaucracy, and while we would not equate the absence of hard data in a case such as this with the absence of a threat to public safety, the fact remains that OCRE has made no showing that it has anything to contribute to the analysis of the plant's seismic security and only the barest of allegations that the January, 1986, earthquake has undermined the technical premises of the plant's structural design. Despite the appeal panel's willingness to give OCRE an opportunity to flesh out these allegations, we do not consider the NRC's decision to dispense with that opportunity necessarily to indicate unseemly haste.

Baltimore Gas and Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87 (1983), involved a challenge to the NCR's approach to evaluating the environmental impact of the storage of certain nuclear wastes. In this context, the Court observed that

> "a reviewing court must remember that the Commission is making predictions, within its area of special

> expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."

Id. at 103. Arguably, somewhat less deference is appropriate here, but the fact remains that our role in reviewing NRC denials of requests to reopen the record is quite limited:

> "Where as here the agency has taken final action on a matter that is peculiarily within its realm of expertise, we will not require the agency to reopen its proceedings except upon a clear showing of abuse of discretion or of extraordinary circumstances."

Mobil Oil Corp. v. ICC, 685 F.2d 624, 632 (D.C. Cir. 1982).

A failure of the NRC to follow its own guidelines would constitute an abuse of discretion, *see San Luis Obispo Mothers for Peace v. NRC,* 751 F.2d 1287, 1318 (D.C. Cir. 1984), *aff'd,* 789 F.2d 26 (D.C. Cir. 1986) (en banc), but the NRC's action here was expressly premised upon a well-founded conclusion that OCRE had failed to show that new data resulting from the January, 1986, earthquake were safety significant. Evidently, OCRE was surprised by the NRC's procedure of interjecting itself into the reopening petition process and cancelling the exploratory hearing scheduled by the appeals panel. However, so long as the decision to reopen is committed to the NRC's discretion, no intervenor can claim an entitlement to an exploratory hearing the NRC reasonably deems to be unnecessary.

III

NRC regulations delegate responsibility for developing off-site emergency plans to state and local governments. 10 C.F.R. § 50.47. These regulations provide in part:

> "(a)(1) Except as provided in paragraph (d) of this section, no operating license for a nuclear power re-

actor will be issued unless a finding is made by NRC that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

"(2) The NRC will base its finding on a review of the Federal Emergency Management Agency [FEMA] findings and determinations as to whether State and local emergency plans are adequate and whether there is reasonable assurance that they can be implemented, and on the NRC assessment as to whether the applicant's onsite emergency plans are adequate and whether there is reasonable assurance that they can be implemented."

The emergency plan for the Perry plant was developed by the State of Ohio, which now contends that the plan is seriously inadequate.

Ohio seeks to intervene in the plant's licensing proceedings, citing 10 C.F.R. § 2.715(c), which provides in part:

> "The presiding officer will afford representatives of an interested State, county, municipality, and/or agencies thereof, a reasonable opportunity to participate and to introduce evidence, interrogate witnesses, and advise the Commission without requiring the representative to take a position with respect to the issue."

This regulation preserves the right of a state to participate in licensing hearings, but does not address the state's rights once the hearings have been completed and the record closed. Thus, the state's belated request to intervene must be considered by this court in light of the limited "abuse of discretion" standard of review otherwise applicable to requests to reopen the record, as set forth above.

Ohio contends, however, that the NRC has abused its discretion in denying it leave to intervene. Ohio claims it is not an opponent of nuclear power, and has no intention of

holding up plant operations indefinitely. On the contrary, Ohio asked only for a delay in full-power operation until the end of 1986 so that the emergency plan could be fully studied and revisions could be undertaken. Ohio's request was not unreasonable. This court takes judicial notice of the fact that the stays we have imposed have come very close to rendering this issue moot despite our best efforts to resolve this matter expeditiously.

We recognize also that Ohio's responsibility for the safety of its inhabitants is unquestionably deserving of this court's consideration. In view of this responsibility, the untimeliness of Ohio's action and it failure to participate in the earlier public hearings would be entirely insufficient as grounds for NRC action dispensing with Ohio's concerns. The NRC, however, has neither ignored Ohio's contentions nor acted unreasonably in denying leave to intervene.

First, we note that Ohio's responsibility is entirely with *off-site* emergency preparations. These preparations may proceed apace regardless of the operational status of the plant.

Second, while the regulatory scheme was clearly designed to prevent full-power licensing until the NRC finds that there is "reasonable assurance" that the emergency plan is adequate, the NRC has in fact made a finding to this effect. Many of Ohio's more specific concerns were raised in the public hearings by intervenor Sunflower Alliance. Ohio's newfound misgivings are troubling, but do not necessarily undercut the reliability of the NRC's finding.

Finally, issuance of a license does not preclude Ohio from proceeding with research, oversight, and revisions in any portions of the emergency plan perceived as inadequate. Furthermore, 10 C.F.R. § 2.206 gives any person the right to institute a proceeding to "modify, suspend or revoke a license." While we recognize that it may be more difficult to shut a plant down than to prevent initial licens-

ing, the procedure provided for by § 2.206 appears to provide an adequate remedy for any grave safety shortcomings Ohio may henceforth discover and document.

These considerations persuade us that the NRC acted reasonably in denying Ohio's request to intervene in the full-power licensing proceedings.

IV

Aside from the allegations contained in OCRE's petition to reopen the record and Ohio's petition for leave to intervene, we are presented with no basis upon which the NRC's decision granting the full-power operating license should be reversed. Accordingly, petitioners' objections to this decision must also be rejected.

V

Our treatment of the issues raised on this appeal is conditioned by the very limited role Congress has assigned to the courts in the statutory scheme regulating the construction and operation of commercial nuclear power plants. As the Supreme Court has observed:

> "We are acutely aware that the extent to which this Nation should rely on nuclear power as a source of energy is an important and sensitive issue. Much of the debate focuses on whether development of nuclear generation facilities should proceed in the face of uncertainties about their long-term effects on the environment. Resolution of these fundamental policy questions lies, however, with Congress and the agencies to which Congress has delegated authority, as well as with state legislatures and, ultimately, the populace as a whole. Congress has assigned the courts only the limited, albeit important, task of reviewing agency action to determine whether the agency conformed with controlling statutes. As we emphasized

> in our earlier encounter with these very proceedings, '[a]dministrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as mandated by statute. . ., not simply because the court is unhappy with the result reached.' Vermont Yankee, 435 US, at 558, 55 L Ed 2d 460, 98 S Ct 1197 [1978]."

Baltimore Gas and Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 97 (1983). The NRC acted within the confines of its statutory discretion in making the three decisions challenged by these appeals. This court is therefore required to uphold those decisions.

VI

The orders of the NRC appealed from are AFFIRMED.

JONES, Circuit Judge, concurring. The opinion of the court in this case sets out as good a basis for affirming the Nuclear Regulatory Commission's orders as can be done. Because I am persuaded that the scope of judicial review delineated by the Supreme Court in *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983), and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), is extremely narrow, I concur in today's result. Nonetheless, I am sufficiently alarmed by the events that gave rise to the instant proceedings to write separately.

The court's opinion summarizes OCRE's description of the NRC's "bureaucratic evils" as:

> first, the agency's inclination to shut the public out of the decision-making process, confident in the sufficiency of its own knowledge and expertise; and second, the agency's impatience with the pace of the democratic decision-making process imposed upon it

> by statute, which inclines the NRC to dispense with any procedure, however well-founded, that threatens delay.

The majority of this panel finds no merit in such a description. However, if the proceedings in this case are any indication of the commission's standard practice, I think that the description is quite accurate. From my perspective, there is no better way to characterize the Commission's *sua sponte* order vacating the Appeal Panel's order scheduling an exploratory mini-hearing. The purpose of that mini-hearing was to determine whether the unexpected and uncharacteristically strong earthquake raised significant safety issues warranting a reopening of the record.

The Commission's treatment of the State of Ohio's concerns with the adequacy of the off-site emergency preparedness plan is even more disconcerting. The NRC's argument in support of its denial of the State's motion to intervene boils down to the following: While it is not too late for the State to make improvements in the existing off-site emergency plan that it fears may be seriously inadequate in certain respects, it is in fact too late for the State to guarantee the safety of its citizenry by temporarily delaying the issuance of Perry's full-power license pending the completion of its formal review. Granted, the Commission is not legally *required* to further stay the plant's full-power operation since it has satisfied itself that the existing off-site plan is adequate. However, that is not really the point. Where, as here, the State has expressed bona fide concerns for the safety of its people and has in good faith undertaken affirmative investigatory measures, it is at best patronizing for the Commission to turn a deaf ear to the State's plea for a brief delay. While the Nuclear Regulatory Commission may be secure in its belief that it is the ultimate protector of the Amercian people generally, and of the people of Ohio specifically, from the hazards of

nuclear power generation. I do not think that Congress ever intended for the Commission to have this type of one-sided relationship with a sovereign State over a serious matter of local health and safety.

U.S. GOVERNMENT PRINTING OFFICE: 1987—181-483/40270